UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN RE VALSARTAN, LOSARTAN, AND IRBESARTAN PRODUCTS LIABILITY LITIGATION	**MDL No. 2875** **HON. RENEÉ MARIE BUMB** **CIVIL NO. 19-2875 (RMB)**
THIS DOCUMENT RELATES TO ALL CASES	

TPP TRIAL PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING DAMAGES THEORY AND THEIR MOTION *IN LIMINE* NO. 16

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Defendants acknowledge (yet again) that the benefit-of-the-bargain measure is the appropriate measure of damages, so determined by the Court. Defendants then discard those rulings, believing they may simply propose to the jury a completely *different* law of damages and leave it to the jury to choose which law applies. This is impermissible. The Court instructs the jury on the law and there is no place under the damages law in this case for Defendants' speculative replacement drugs theory.

Defendants cite the *Talc* decision. But there, the Third Circuit emphasized that these were "*different* theories of economic injury" that could be alleged by a *plaintiff* to pass the standing hurdle. 903 F.3d at 282. That an "alternative product" theory of damages exists in different legal and factual contexts is a *non sequitur*. Because it does not fit the damages standard here, Defendants distort the standard.

To wit, Defendants no longer dispute the point of sale as the appropriate place to measure damages. Instead, Defendants argue that "the payments for alternative drugs would have occurred at the same point in time as … in the real world." (Dkt. No. 2819, at 4-5 & n.3.) But this completely and illogically rewrites the legal expression of benefit-of-the-bargain damages to the "difference in value between what was bargained for and what was received [**or would have been received in its place**]." This circular damages formulation would *in fact* create a law of no damages.

Defendants accuse Plaintiffs of "brushing aside" their authorities. But legal context is important, as is the nature of the injury. Plaintiffs contend that the *VCDs*

themselves were worth-less because they were not as warranted or represented. By contrast, Defendants invoke off-label promotion or design-defect RICO cases where the plaintiffs' damages were not attached to a diminished value of the product itself, but rather hinged on fewer quantities (*Sergeants Benevolent*)[1] or cheaper alternatives (*Avandia*)[2] being prescribed but for the unlawful conduct. Those expressions of damages necessarily implicate replacement drugs and are legally irrelevant and factually inapposite here, where the product itself had zero economic value.

Defendants' assertion that this case is somehow unique because the "VCDs ***were*** sold" in real life and therefore warrants construction of counterfactual "but for" damages world as is done in RICO, antitrust, and patent lost profits cases (*Malibu Boats*, for example) is illogical. (Dkt. No. 2819, at 3-4 (emphasis in original).) All breach of warranty, misrepresentational fraud, and CPL cases involve products that were sold in real life; otherwise, there would be no actionable claim. The benefit-of-the-bargain damages measure explicitly contemplates that the product was in fact

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[1] Defendants' incorrectly assert that Judge Kugler only rejected *Sergeants Benevolent* on RICO causation. Judge Kugler explicitly quoted *BCBS*'s discussion of this very same defense theory ("Plaintiffs cannot demand damages in the amount of the full price paid for the drugs because the calculation fails to take into account the cost of therapeutic alternatives Plaintiffs would have had to provide") and "completely disregarded" the defense argument that it must be a component of plaintiff's damages, just as Judge Sánchez did. (*See* SJ Op. 61-62 (emphasis added).)

[2] (MTD Op. 3, at 16 & n.10 ("The Court agrees the cases defendants cite and which concern express warranty liability for defectively designed drugs are not particularly on point here." (Dkt. No. 775).)

sold (difference in value bargained for versus **value of what *was* received**).

Defendants distort Judge Kugler's summary judgment opinion in arguing that the Court deferred this issue to the jury. Plaintiffs' MIL 16 concerns *only* replacement drugs, and not Defendants' separate (but also misguided) argument that their adulterated and contaminated VCDs may still have been effective. The quoted portion of Judge Kugler's ruling was clearly limited to this cynical "defense" and made no mention of replacement drugs whatsoever.[3] (SJ Op. at 56-58.)

Finally, Defendants' proffer regarding Dr. Stiroh only underscores why the Court should grant Plaintiffs' MIL 16. First, Dr. Stiroh's testimony regarding TPPs' expectations (or supposed lack thereof) runs directly contrary to this Court's summary judgment decision that Defendants in fact provided an express warranty to TPP Plaintiffs regarding their VCDs. (SJ Op., at 29, 71.) And Dr. Stiroh's testimony that TPPs were "likely financially better off" showcases why this irrelevant, contrary-to-law net opinion accompanied by no actual methodology or result even (and thus inviting the jury to speculate), is very likely to confuse and lead the jury astray from their legal instruction on calculation of damages.

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[3] Defendants' companion assertion that *BCBS* supports their position is also incorrect. Judge Sánchez found in TPP plaintiffs' favor that their damages model need not account for the cost of "therapeutic alternatives[.]" *BCBS*, 417 F. Supp. 3d at 558-59. Judge Sánchez was thoroughly unimpressed with the GSK defendant's replacement drugs argument, but was not presented with a motion to exclude. Judge Kugler likewise rejected this argument. (SJ Op. at 62.)

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2024, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants in this matter.

/s John R. Davis